D.B.INCOME TAX APPEAL NO. 01/99
(ACIT, CIRCLE BHILWARA VS. M/S MADAN LAL GAGGAR, BHILWARA)

Date of Order : 04.10.2006

HON'BLE MR. RAJESH BALIA,J.
HON'BLE MR. GOPAL KRISHAN VYAS,J.

Mr. K.K.Bissa, for the appellant.
Mr. Sanjeev Johri, for the respondents.

Heard.

learned counsel for the appellant. The following substantial question is framed at the time of admission;

> "Whether in the facts & circumstances of the case, the Tribunal committed error of law by not drawing presumption u/s 271-C (Explanation 5) of the Income Tax Act, that the assessee firm concealed the income by not mentioning" in the return of the relevant year".

The facts of proceedings as appear from the order passed by the Tribunal and on the basis of material made available to us by learned counsel for the parties are that the assessee Sh. Madanlal has two status under the Income Tax Act, 1961. He is being assessed to income tax as individual in the name of Sh. Madanlal and total estimated tax liability for Assessment Year 1987-88 and 1988-89 was computed for the purpose of retaining assets found during the search. The order

shows that Rs. 4 lacs were included in income of assessment year 1987-88 and Rs. 3 lacs for the assessment year 1988-89. The firm of which Madanlal is partner assessed as registered firm in the name of M/s Madanlal Gaggar. The present appeal relates to proceedings for levy of penalty on the firm M/s Madanlal Gaggar. A search was conducted at the premises of Sh. Madanlal, between 14.10.1987 to 17.10.1987. This search was carried out under a warrant issued under Section 132(1) in the name of Sh. Madan Lal . Simultaneous search was conducted on the business premises of the assessee. Orders in terms of Section 132(5) of the Income Tax Act, 1961, was also made in the name of Sh. Madan lal only in his status as individual. In the order under Section 132 (5) it was noticed that no separate addition is being made in the case of firm since the assessee has voluntarily offered in his statement recorded under Section 132(5) the amount of 7 lacs income from undisclosed sources to be spread over in two different years i.e. assessment year 1987-88 and 88-89.

The assessee-firm has filed return initially for assessment year 1987-88 on 13.08.1987 and declared total income of Rs. 47,671/- and the assessment was also completed under Section 143(1) on the returned income on 31.3.87. However, later on this return for 87-88 filed on 9.2.90 in pursuance to notice under Section 148 issued on 6.2.90. The assessee showed income of Rs. 4,46,761/- instead of Rs. 46,761/- as per original return and claimed loss of Rs. 1 lac in mining

business. However, the Assessing Officer disallowed the claim of loss and assessed the firm at Rs. 4,47,761/-. in his individual capacity including remainder Rs. 3 lacs as his income the amount of Rs. 3 lacs surrendered by assessee Sh. Madanlal out of 7 lacs as noticed order under Section 132(5) was assessed in the status as individual and this has become final.

The assessee-firm appealed against the order of assessment including Rs. 4 lacs in the assessment of the income of the firm contending that he had surrendered amount of 4 lacs in his individual capacity. By mistake the amount had been again included in the income of firm, while filing revised return. He, therefore, claimed exclusion of Rs. 4 lacs, therefrom.

The CIT [Appeals] vide his order dated 2.3.95 allowed the appeal. The CIT has made the following observations;

> "I have considered the facts of the case. In support the Id. A/R has filed photocopy of order u/s 132(5) order which clearly states that search was authorized in the case of Shri Madanlal Gaggar (Indl) and the order u/s 132 (5) was passed in his individual capacity. This includes sum of Rs. 4 lacs working of which has been given that tax liability for A.Y. 87-88 of Rs. 3,67,855/- which was duly deposited by the individual as stated supra. Apparently, there appears to be some confusion and amount has been included in the hands of the firm. The individual files are not before me. Apparently the authorisation as well as order u/s 132(5) was passed in the individual capacity therefore, in the firness of thing the AO is directed to verify the individual asstt.

> Records of Shri Madanlal Gaggar for A.Y. 87-88 to verify whether the amount of surrender of Rs. 4 lacs as per order u/s 132(5) also was included in his individual return and the tax paid. If so, the amount shall be excluded from the hands of the firm. Subject to verification the appeal is allowed."

The CIT [Appeals] has also referred to liability of tax under Section 132(5) passed in the individual capacity. This includes sum of Rs. 4 lacs working of which has been given while computing tax liability for asstt. Year 1987-88 at Rs. 3,67,855 /- which was duly deposited by the individual as stated. This amount was stated to have been paid by the assessee as per the finding recorded by the CIT [Appeals].

For assessment year 1987-88 the assessee as individual had furnished return of his income on 10.8.87 before search was conducted. The assessment took place on 30.3.90. Significantly the Assessment Order by Assistant C.I.T., Investigation Circle recorded his finding as under:-

> "During the course of proceedings under Section 132(5) in the case of firm the assessee vide his letter dated 4.2.88 declared net income asessable in the assessment year 1987-88 at Rs. 4,00,000/- and accordingly he filed revised return on 5.2.90 declaring net income at Rs. 4,15,903."

In other words in the case of Individual for assessment year 1987-88 the A.O took the view and connected

declaration of Rs. 4 lacs during search as income of the firm and assessed the assessee. He was not found guilty of any concealment.

However, penalty proceedings were initiated in the case of firm under Section 271(1)(c) for concealing particulars of income on the basis of addition made in revised return and penalty was levied. Assessee's plea to invoke explanation 5 to Sec. 271(1) was rejected inter alia on the ground that no statement under Section 132(4) could be recorded by the assessee Madanlal because he was not present during the search. However, in the next breath the assessing officer has referred to the statement recorded under Section 132(4).

Be that as it may, he found that since no amount was surrendered during the course of his examination but amount was surrendered by a separate letter dated 4.2.88 addressed to the officer during the course of proceedings under Section 132(5) which we have noticed above. The assessee cannot get the benefit of Section 271(1)(c) explanation (5) read with section 132 (4) of the I.T.Act which absolves the amount surrendered during the course of statement under Section 132(4) by giving details thereon from the reach of penalty proceedings. Thus, by denying the benefit of presumption of the proceedings under Section 271 (5), the assessing officer imposed the minimum imposable penalty under Section 27(1) (c) vide order dated 28.9.95.

The CIT [Appeals] while passing the order dated 15.1.96 confirmed the levy of penalty.

However, in the second appeal, the Tribunal found by considering the aforesaid material that search was conducted in the presence of Sh. Madanlal in individual capacity. That order under Section 132(5) was made against Individual Madanlal in his individual capacity has stated that the amount of Rs. 4 lacs is being surrendered him in his individual capacity and not by the applicant-firm. Estimated tax liability was also computed for assessment year 1987-88 in respect of Mandan lal individual by including Rs. 4 lacs as amount surrendered by him and demand created by the order was duly paid by the Assessee in his individual capacity. But by mistake the applicant firm has declared the income surrendered by the individual as the income of the firm. On account of this mistake the firm cannot be attributed with guilt of concealing the particulars of the firm's income which was surrendered by the assessee in individual capacity. It also noticed that the tax on the surrendered income made by Madanlal in individual capacity has also been paid by him. In view thereof, the Tribunal found that penalty could not be levied under section 271(c). For the same reason, penalty levied under Section 273 (1)(a) for nonpayment of advance tax by the assessing officer was cancelled.

At this juncture, we found that reference to the presumption in question appears to be inapt. As the levy of penalty by the assessing officer and subsequent setting aside the penalty by the Tribunal is not founded on the basis of presumption that the assessee is not guilty of concealment or furnishing the particulars of income by considering the material that was available on record and accepted the explanation furnished by the assessee in respect of addition made in the reutrn of income for the assessment year 1987-88, therefore, nothing turns on the question of presumption only.

It is well settled and hardly need any elaboration that presumption raised under section 271(1)(c) Explanation 5 read with section 132(4) of the I.T. Act is rebuttable presumption which can be rebutted by adducing additional evidence as well as by the material available on record also. No specific mode has been prescribed for rebutting presumption of concealing particulars of income or concealment of income which arise in respect of addition made or claim to deduction disallowed by the Assessing Authority as per Explanation (1) appended to Sec. 271(1).

Therefore, when the tribunal has considered the material and reached a definite finding that the assessee is not guilty of concealing the particular of his income or furnishing inaccurate particulars of such income, the question of burden of proof and raising of presumption takes backseat.

The Explanation-I to Section 271(1) reads as under:-

> "Where in respect of any facts material to the computation of the total income of any person under this Act,-
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> (A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) [or the Commissioner] to be false, or [and fails to prove that such explanation is bona fide and that all the fats relating to the same and material to the computation of his total income have been disclosed by him],
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> then, the amount added or disallowed in computing the total income of such person, as a result thereof shall, for the purposes of clause(c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

Apparently, it is a case in which the assessing officer has not found as such that the explanation offered by the assessee is false. On the other hand, it was found by the CIT (Appeals) in the first instance that order Under Section 132(5) reveals that surrender of income has been made by the assessee in his individual capacity because the order under Section 132(5) was made in the capacity while treating the assessee as individual only and the proceedings were taken in respect of the individual only. It was also accepted that as per the amount taken, liability determined under section 132(5) has already been paid by the assessee, therefore, it was apparently established by the order of CIT (A) read with order passed under section 132(5) of the Act of

1961 that assessee in the individual capacity has surrendered Rs. 7 lacs as income from undisclosed sources spreading it out in two assessment years 1987-88 & 88-89. The assessees's estimated liability for tax on such income was worked out in the order under Section 132(5) only on that premises. Tax liability of the assessee as individual also determined which has been paid by him. From these facts, it was apparent that the assessee as individual had surrendered Rs 7 lacs before the assessing officer in proceedings under Section 132 and he has also paid tax thereon.

Very significantly while the assessing the assessee as individual the Assessing Officer noticed and accepted that surrender of Rs. 4 lacs during search was in the case of firm. This finding is apparently incongruous and contrary to record of proceedings under Section 132(5) which was placed before us during hearing and also contrary to findings recorded by CIT (Appeals) in appeal of the firm against the Assessment Order under Section 143 [3]. If the surrender of income is assumed to be in the case of firm by Assessing Officer and the firm had surrendered the income of its capacity as firm. There would have hardly been any case for initiating penalty proceedings under Section 271(1)(c) . It was by disjuncting the case of firm from its own findings in the case of assessee as individual that it had discarded its Explanation .

Same mistake was apparently committed by the CIT (Appeals) while affirming the penalty order in the case of firm. While rejecting the plea of the assessee to invoke Explanation 5 to Sec. 271(1) the CIT (Appeals) relied on the statement under Section 132(4) as in respect of individual and not in the case of firm. But in coming to this conclusion that assessee had in all surrendered Rs. 7 lacs during search proceedings Rs. 4 lacs for assessing year 1987-88 and Rs. 3 lacs for assessing year 1988-89. He paid the tax determined in respect of these two items as per order passed under Section 132(5) as individual. In his return also he had surrendered Rs. 7 lacs only albeit Rs. 4 lacs were included in the return of firm and not in the case of individual. On the basis of order under Section 132(5) no additions were made in the returned income of Individual which would have been the natural corollary of attributing the surrender of Rs. 7 lacs by the assessee as individual and suffer order under Section 132(5) on that basis as individual in respect thereof.

There was never any amount other than surrendered during search by the assessee as on individual.

It is also noticeable that the assessee, in fact, challenged the order passed on the basis of return submitted by firm before the CIT [Appeals] bringing out this mistake and sought exclusion of income of the assessee of the firm, which was found plausible by the CIT [Appeals]. In all these circumstances, if the Tribunal has

accepted the Explanation furnished by the Assessee to be correct, no error can be found with it nor such finding can be held to be perverse.

In view of these findings that the assessee has succeeded to substantiate explanation furnished by him, at any rate the explanation submitted by the assessee cannot be said to be not bonafide . In that view of the matter Tribunal was justified in not sustaining the penalty merely by raising presumption under Explanation 1- Explanation 5.

We are of the opinion that in the aforesaid facts and circumstances, the findings that the assessee's explanation about the surrendered income during the proceedings under Section 132 (5) having wrongly been included in the return submitted by the firm of which the assessee individual as a partner has substantiated are findings of fact based on relevant material, the same cannot be said to be perverse. Hence levy of penalty has rightly been not sustained.

In view of the aforesaid, the order passed by the Tribunal does not call for interference.

Accordingly, the appeal fails and is hereby dismissed. There shall be no order as to costs.

(GOPAL KRISHAN VYAS),J. **(RAJESH BALIA),J.**

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